


3-7-2019

## Comparative Perspectives of Adult Content Filtering: Legal Challenges and Implications

Adam Szafranski, Piotr Szwedo and Malgorzata Klein

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

 Part of the [Comparative and Foreign Law Commons](#), [European Law Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), and the [Other Law Commons](#)

---

### Recommended Citation

Adam Szafranski, Piotr Szwedo and Malgorzata Klein, *Comparative Perspectives of Adult Content Filtering: Legal Challenges and Implications*, 68 Cath. U. L. Rev. 137 (2019).

Available at: <https://scholarship.law.edu/lawreview/vol68/iss1/9>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# COMPARATIVE PERSPECTIVES OF ADULT CONTENT FILTERING: LEGAL CHALLENGES AND IMPLICATIONS

*Adam Szafrński,<sup>+</sup> Piotr Szwedo,<sup>++</sup> Małgorzata Klein<sup>+++</sup>*

I.	INTRODUCTION: GLOBAL DEVELOPMENT, INTERNET ACCESS, AND ADULT CONTENT EXPOSURE AS A RISK .....	137
II.	REACTION TO THE RISK: ADULT CONTENT FILTERING .....	141
III.	MITIGATING THE RISK THROUGH REGULATION .....	143
IV.	DEFINING CHALLENGES TO ADULT CONTENT REGULATIONS .....	146
V.	BALANCING ADULT CONTENT FILTERING WITH FREEDOM OF EXPRESSION .....	147
	A. <i>Proportionality Test</i> .....	152
	B. <i>Binding Law or Self-Regulation</i> .....	153
VI.	BALANCING ADULT CONTENT FILTERING WITH FREEDOM OF PROVIDING SERVICES, PUBLIC MORALS, AND CHILDREN’S RIGHTS .....	155
	A. <i>WTO Law</i> .....	155
	B. <i>EU Law</i> .....	157
	1. <i>Directive on Electronic Commerce</i> .....	157
	2. <i>Child Protection at the EU Level</i> .....	159
VII.	CONCLUSION .....	161

## I. INTRODUCTION: GLOBAL DEVELOPMENT, INTERNET ACCESS, AND ADULT CONTENT EXPOSURE AS A RISK

The importance of internet access for development is evident. This is stressed by the Sustainable Development Goals (SDGs).<sup>1</sup> Goal 9 calls on all parties to “[b]uild resilient infrastructure, promote sustainable industrialization, and foster

---

<sup>+</sup> Adam Szafrński, Ph.D. habil., is a lecturer in public economy law in the Chair of Administrative Economic and Banking Law at the University of Warsaw. He has published monographs and articles on constitutional and administrative law.

<sup>++</sup> Piotr Szwedo, Ph.D. habil., is a lecturer in international law and Head of OKSPO Centre for Foreign Law Schools at the Jagiellonian University in Krakow. He has published monographs and articles on international economic law and global governance.

<sup>+++</sup> Małgorzata Klein is a Ph.D. student at the Faculty of Geography and Regional Studies at the University of Warsaw, Poland. She holds a Master’s degree in Economics from the Warsaw School of Economics and a Master’s degree in French Language and Literature from the University of Warsaw. She is currently researching Ecosystem Services and quality of life in developing countries with a special focus on Madagascar.

1. *Goal 9: Build Resilient Infrastructure, Promote Sustainable Industrialization and Foster Innovation*, U.N., <http://www.un.org/sustainabledevelopment/infrastructure-industrialization/> (last visited Feb. 17, 2018).

innovation.”<sup>2</sup> One of Goal 9’s targets is to “[s]ignificantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020.”<sup>3</sup>

An International Telecommunication Union report states that 70% of the world’s youth is already online.<sup>4</sup> In developed countries, 94.3% of people ages 15–24 have internet access compared to 67.3% in developing countries.<sup>5</sup> This trend is bolstered by the increasing availability of mobile phones and LTE technology.<sup>6</sup> There are already more than seven billion mobile cellular phones in the world.<sup>7</sup> The British Office of Communications (Ofcom) reported in 2015 that smartphones had, for the first time, “overtaken laptops as the most popular device” for online access.<sup>8</sup>

The internet’s many benefits include health information through telemedicine,<sup>9</sup> education through e-learning,<sup>10</sup> and administration through e-government instruments.<sup>11</sup> It also limits corruption, and increases transparency and accountability through electronic management systems.<sup>12</sup> M-commerce and e-commerce are probably two of the internet’s major advantages, as they enable any country to enter the global trading system.<sup>13</sup> This is one reason why Sustainable Development Goal Target 17.10 is to “promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system”; the previously mentioned Target 9.c. calls for universal and affordable web access.<sup>14</sup>

---

2. *Id.*

3. *Id.*

4. *ICT Facts and Figures 2017*, INT’L TELECOMM. UNION, <http://www.un.org/sustainable-development/infrastructure-industrialization/> (last visited December 7, 2017).

5. *Id.*

6. *Id.*

7. See *The State of Broadband 2015: Broadband as a Foundation For Sustainable Development*, BROADBAND COMM’N FOR DIG. DEV. 8 (Sept. 2015), <http://www.broadbandcommission.org/documents/reports/bb-annualreport2015.pdf>.

8. Elena Martellozzo et al., “. . . I wasn’t sure it was normal to watch it . . .”: *A Quantitative and Qualitative Examination of the Impact of Online Pornography on the Values, Attitudes, Beliefs and Behaviours of Children and Young People*, NSPCC (May 2017), <https://www.nspcc.org.uk/globalassets/documents/research-reports/mdx-nspcc-occ-pornography-report-final.pdf>.

9. Steven M. Edworthy, *Telemedicine in Developing Countries*, 323 B.M.J 524, 524 (2001).

10. A. S. Sife et al., *New Technologies For Teaching and Learning: Challenges For Higher Learning Institutions in Developing Countries*, 3 INT’L J. OF EDUC. & DEV. ICT 57, 57 (2007).

11. Valentina (Dardha) Ndou, *E-government for Developing Countries: Opportunities and Challenges*, 18 ELEC. J. ON INFO. SYS. IN DEVELOPING COUNTRIES 1, 1 (2004).

12. Sujoy Dutta, *An Uneven Path to Accountability: A Comparative Study of MGNREGA in Two States of India*, WZB BERLIN SOC. SCI. CTR. 7, 17 (2015).

13. *E-commerce in Developing Countries: Opportunities and Challenges for Small and Medium-Sized Enterprises*, WTO 1, 6 (2013), [https://www.wto.org/english/res\\_e/booksp\\_e/economy\\_brochure\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/economy_brochure_e.pdf) (defining e-commerce as “the sale or purchase of goods or services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders” and referring to mobile e-commerce as “m-commerce”).

14. *17.10 Promote a Universal, Rules-based, Open, Non-discriminatory and Equitable Multilateral Trading System Under the WTO Including Through the Conclusion of Negotiations*

Nevertheless, this rapidly expanding access to the internet is a double-edged sword that comes with certain risks, especially for children. According to a survey that focuses on these implications in Brazil by Alexander Barbosa et al., 53% of parents in the families that took part in Brazil were not internet users.<sup>15</sup> It also states that, “the proportion of Brazilian parents/guardians who were internet users and accessed the internet via mobile phones was much lower than the proportion of their children, 6% and 18%, respectively.”<sup>16</sup> As Berson and Berson put it: “Internet is Janus-faced when it concerns children. Within this context, a number of developing countries are facing the challenge of finding the right balance between the promotion of Internet access for children and online child safety and protection.”<sup>17</sup>

Although it is growing, the body of research on the potentially harmful effects of pornography is still very limited. Whether viewing pornography is addictive is still a topic of research and debate.<sup>18</sup> Some academics challenge the adequacy of the term “addiction,”<sup>19</sup> but in 2011, the American Society of Addiction Medicine (ASAM) changed its definition of addiction to one which is not solely related to problematic substance use.<sup>20</sup> The ASAM states that “[r]esearch shows that the disease of addiction affects neurotransmission and interactions within reward circuitry of the brain, leading to addictive behaviors that supplant healthy behaviors, while memories of previous experiences with food, sex, alcohol and other drugs trigger craving and renewal of addictive behaviors.”<sup>21</sup> Even if susceptibility to such dependence varies, neuroscience<sup>22</sup> and psychology<sup>23</sup> seem to confirm that viewing pornography can lead to addiction,<sup>24</sup> and that this

---

*Within its Doha Development Agenda*, SUSTAINABLE DEV. SOLS. NETWORK, <http://indicators.report/targets/17-10/> (last visited Feb. 17, 2018); 9.c *Significantly Increase Access to ICT and Strive to Provide Universal and Affordable Access to Internet in LDCs by 2020*, SUSTAINABLE DEV. SOLS. NETWORK, <http://indicators.report/targets/9-c/> (last visited Feb. 17, 2018).

15. Alexander Barbosa et al., *Risks and Safety on the Internet: Comparing Brazilian and European Children*, LSE: EU KIDS ONLINE 1, 14 (2013).

16. *Id.*

17. HIGH-TECH TOTS: CHILDHOOD IN A DIGITAL WORLD 194 (Ilene R. Berson & Michael J. Berson eds., 2010).

18. Athena Duffy et al., *Self-Perceived Pornography Addiction in Adults: A Systematic Review of Definitions and Reported Impact*, 13 J. OF SEXUAL MED. 760, 760 (2016).

19. David Ley et al., *The Emperor Has No Clothes: A Review of the ‘Pornography Addiction’ Model*, PSYCHOL. TODAY (Feb. 12, 2014), <https://www.psychologytoday.com/sites/default/files/Ley-PornAddictionReview.pdf>.

20. *ASAM Releases New Definition of Addiction*, ASAM 1 (Aug. 15, 2011), <http://www.asam.org/docs/pressreleases/asam-definition-of-addiction-2011-08-15.pdf>.

21. *Id.* at 2.

22. Donald L. Hilton Jr. & Clark Watts, *Pornography Addiction: A Neuroscience Perspective*, 2 SURGICAL NEUROLOGY INT’L (2011).

23. Jeffrey J. Ford et al., *Structural Therapy With a Couple Battling Pornography Addiction*, 40 AM. J. OF FAMILY THERAPY 336, 336–346 (2012).

24. VICTOR B. CLINE, *PORNOGRAPHY’S EFFECTS ON ADULTS AND CHILDREN* 3 (2001).

addiction is a “clinically identifiable illness.”<sup>25</sup> According to studies conducted by Valerie Voon, a scientist at Cambridge University, “[p]eople who are addicted to pornography show similar brain activity to alcoholics or drug addicts.”<sup>26</sup> Although, “it’s probably too early to put compulsive porn users in a box with people who suffer from drug or alcohol problems.”<sup>27</sup> As addictions usually begin at a young age, children constitute the most vulnerable group, and, as such, they require greater protection.<sup>28</sup>

There is sufficient scientific evidence to conclude that children are harmed by access to pornography. Ellen Johanna Helsper compiled a comprehensive opinion from a group of experts who agreed that viewing pornography has detrimental effects on children.<sup>29</sup> Specific negative effects of exposing children to adult content include addiction to pornography, deviant or criminal sexual behavior, and aggression and negative attitudes towards women.<sup>30</sup> It negatively affects their sexual beliefs and can lead to “risky behaviour.”<sup>31</sup> The pornography already on the mainstream internet promotes aggression towards and the degradation of women. According to research conducted by Ana Bridges et al., 88.2% of pornographic scenes contain physical aggression and 48.7% contain verbal aggression.<sup>32</sup> The perpetrators of this aggression were predominantly male and the targets overwhelmingly female.<sup>33</sup> Pornographic content, especially

---

25. M. Douglas Reed, *Pornography Addiction and Compulsive Sexual Behavior*, in *MEDIA, CHILDREN, AND THE FAMILY SOCIAL SCIENTIFIC, PSYCHODYNAMIC, AND CLINICAL PERSPECTIVES* 249 (Dolf Zillmann et al. eds., 1994); see David L. Delmonico, *Sex on the Superhighway: Understanding and Treating Cybersex Addiction*, in *CLINICAL MANAGEMENT OF SEX ADDICTION* 244 (Patrick J. Carnes & Kenneth M. Adams eds., 2002).

26. Adam Withnall, *Pornography Addiction Leads to Same Brain Activity as Alcoholism or Drug Abuse, Study Shows*, INDEP. (Sept. 22 2013), <http://www.independent.co.uk/life-style/health-and-families/health-news/pornography-addiction-leads-to-same-brain-activity-as-alcoholism-or-drug-abuse-study-shows-8832708.html>.

27. Kirsten Weir, *Is Pornography Addictive?*, AM. PSYCHOL. ASS’N (Apr. 2014), <http://www.apa.org/monitor/2014/04/pornography.aspx>.

28. See Ellen Johanna Helsper, *R18 Material: Its Potential Impact on People under 18—An Overview of the Available Literature*, RES. GATE 19–20 (Jan. 2005), [https://www.researchgate.net/publication/43194364\\_R18\\_material\\_its\\_potential\\_impact\\_on\\_people\\_under\\_18-an\\_overview\\_of\\_the\\_available\\_literature](https://www.researchgate.net/publication/43194364_R18_material_its_potential_impact_on_people_under_18-an_overview_of_the_available_literature); see also Amy O’Leary, *So How Do We Talk About This?*, N.Y. TIMES, May 9, 2012, <https://www.nytimes.com/2012/05/10/garden/when-children-see-internet-pornography.html>; Carolyn C. Ross, *Overexposed and Under-Prepared: The Effect of Early Exposure to Sexual Content*, PSYCHOL. TODAY (Aug. 13, 2012), <https://www.psychologytoday.com/us/blog/real-healing/201208/overexposed-and-under-prepared-the-effects-early-exposure-sexual-content>.

29. *Id.* at 17–18.

30. *Id.*

31. Miranda A. H. Horvath et al., “Basically . . . Porn Is Everywhere”: *A Rapid Evidence Assessment on the Effects that Access and Exposure to Pornography Has on Children and Young People*, MIDDLESEX UNIV.’S RES. REPOSITORY 33 (2013), <http://eprints.mdx.ac.uk/10692/>.

32. Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1065 (2010).

33. *Id.*

when violent in nature, causes children “distress when they accidentally come across online pornography” and is “particularly harmful for vulnerable groups.”<sup>34</sup>

This phenomenon follows a similar pattern in different countries. Forty-seven percent of the Brazilian parents who participated in the Barbosa survey were concerned about the “possibility of the child . . . seeing inappropriate content online” and 20% of the children were “bothered” by seeing pornography online.<sup>35</sup> The negative impact of pornography on children has also been confirmed in India and Taiwan.<sup>36</sup> These countries are where the many and varied forms of human trafficking and sexual exploitation towards children most frequently occur.<sup>37</sup> Moreover, according to Google, the top six porn-watching countries are all considered low-income: Pakistan, Egypt, Vietnam, Iran, Morocco, and India.<sup>38</sup> According to Pornhub statistics, pornography is viewed on a massive scale in India, Mexico, and Brazil.<sup>39</sup> On top of that, we learned from Colin Rowntree, co-founder of porn search engine Boodigo, that “[w]e are definitely witnessing an increase in ‘locally grown’ porn.”<sup>40</sup>

There are no clear statistics about how much porn is watched by children in each country. However, it is known that 23 percent of children in the European Union report to have seen naked images in the media, mostly on the internet.<sup>41</sup> Governments should therefore be more proactive in providing a safer internet for child users.<sup>42</sup>

## II. REACTION TO THE RISK: ADULT CONTENT FILTERING

Many countries, including the U.S., China and France, are already implementing various forms of digital censorship, albeit for different reasons.<sup>43</sup> The debates on adult content filtering in the UK have inspired lawmakers in

---

34. ANDREA MILLWOOD HARGRAVE & SONIA LIVINGSTONE, HARM AND OFFENCE IN MEDIA CONTENT: A REVIEW OF THE EVIDENCE 17 (2d ed. 2009).

35. Barbosa et al., *supra* note 15, at 14–15, 17.

36. Horvath et al., *supra* note 31, at 37.

37. *Trafficking and Prostitution in Asia and the Pacific*, COAL AGAINST TRAFFICKING IN WOMEN ASIA PAC., <https://catwap.wordpress.com/programs/research-documentation-publications/facts-and-statistics/> (last visited March 9, 2018).

38. Laura Secorun Palet, *The Rise of Porn in the Developing World*, OZY (Jan. 19, 2016), <https://www.ozy.com/fast-forward/the-rise-of-porn-in-the-developing-world/64784>.

39. *Pornhub's 2015 Year in Review*, PORNHUB INSIGHTS (Jan. 6, 2016), <http://www.pornhub.com/insights/pornhub-2015-year-in-review>.

40. Palet, *supra* note 38.

41. Sonia Livingstone et al., *Risks and Safety on the Internet: The Perspective of European Children*, LSE: EU KIDS ONLINE 49 (2011), <http://eprints.lse.ac.uk/33731/1/Risks%20and%20safety%20on%20the%20internet%28lsero%29.pdf>.

42. Horvath et al., *supra* note 31, at 11.

43. See generally Fredrik Erixon et al., *Protectionism Online: Internet Censorship and International Trade Law*, ECIPE WORKING PAPER (Dec. 2009), <http://ecipe.org/app/uploads/2014/12/protectionism-online-internet-censorship-and-international-trade-law.pdf>.

Poland and Utah, and it may be expected that they will motivate regulators in the rest of the world.<sup>44</sup> Several years ago, Brent Little and Cheryl Preston wrote:

In many developing countries, the drive to train a new generation in technology skills as a foray into global commerce has produced an epidemic of pornography addiction that parents have no idea how to address. Protecting children from Internet pornography is a global problem without a global answer. The borderless nature of the Internet makes coordinating responses extremely difficult. Individual countries are scrambling to find solutions.<sup>45</sup>

These American authors insisted that the need for internet regulation could mostly be satisfied by the Internet Corporation for Assigned Names and Numbers (ICANN),<sup>46</sup> but they were also critical of the lack of genuine leadership on the part of the U.S. in this respect. This situation has recently changed in the state of Utah, where the Concurrent Resolution on the Public Health Crisis was signed in March 2016.<sup>47</sup> The Resolution does not yet have “enforcement muscle” and follows a 2013 Joint Resolution Regarding the Impact of Adult Images on Children’s Development.<sup>48</sup> Although criticized as being based on weak scientific evidence<sup>49</sup> and for limiting freedom of speech,<sup>50</sup> Utah lawmakers do not seem to be discouraged from taking further steps to restrict access to pornography, especially for children.<sup>51</sup> The Utah regulation was inspired by regulatory measures taken in the UK and was also based on economic arguments.<sup>52</sup>

In the absence of any global solution, individual countries have implemented their own measures. The UK is a pioneer in this area.<sup>53</sup> As UK regulations have inspired lawmakers in Poland and Utah, it may be legitimately expected that other jurisdictions will be similarly inspired. Section III will analyze proposed

---

44. Doug Bolton, *Porn Could Be Blocked from the Internet in Utah Under UK-Inspired Laws*, INDEPENDENT (May 24, 2016, 09:53 BST), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/porn-could-be-blocked-from-the-internet-in-utah-under-uk-inspired-laws-a7044621.html>.

45. Brent A. Little & Cheryl B. Preston, *ICANN Can: Contracts and Porn Sites—Choosing “to Play Internet Ball in American Cyberspace”*, 21 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 79, 79 (2008).

46. *Id.* at 81.

47. S.C.R. 9, 61st Leg., Gen. Sess. (Utah 2016).

48. See Samantha Allen, *Utah’s Anti-Porn Law is Pure Pseudoscience*, DAILY BEAST (Apr. 22, 2016, 1:45 PM), <http://www.thedailybeast.com/articles/2016/04/22/utah-s-anti-porn-law-is-pure-pseudoscience.html>; see also S.J.R. 15, 60th Leg., Gen. Sess. (Utah 2013).

49. Allen, *supra* note 48.

50. Amber Phillips, *Porn Has Been Declared a ‘Public Health Crisis’ in Utah. Here’s Why.*, WASH. POST, Apr. 22, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/04/22/anti-porn-advocates-are-changing-the-game-and-it-starts-with-utah-declaring-it-a-public-health-crisis/>.

51. See Bolton, *supra* note 44.

52. See *id.*

53. See generally Bolton, *supra* note 44.

regulatory methods that may serve to mitigate the risk of harm to children, while Section IV will discuss the challenges inherent in limiting internet freedom.<sup>54</sup> Even those countries that are internet leaders find it difficult to monitor illegal online conduct when offenders minimize their reliance on intermediaries, thereby neutralizing the government's regulatory measures.<sup>55</sup> A concerning byproduct of regulatory measures, however, is that internet censorship may violate the freedom of expression,<sup>56</sup> and the freedom to provide services.<sup>57</sup> For this reason, legal measures have to address issues with "a scalpel rather than a sledgehammer."<sup>58</sup>

### III. MITIGATING THE RISK THROUGH REGULATION

"The Internet is not a lawless prairie."<sup>59</sup> It is regulated by private and public legal instruments both national and international in origin. Limiting access to the internet is relevant for international economic law as it impinges on the freedom to provide services. The liberalization of trade in services was regulated on a universal plan by the General Agreement on Trade in Services (GATS)<sup>60</sup> and by regional economic organizations, such as the EU and North American Free Trade Agreement (NAFTA).<sup>61</sup> Both layers are oriented towards eliminating trade barriers, but remain interlinked with other subsystems of international law, such as human rights protections.

The internet is filtered for a variety of reasons, including political ones. It is "rigorously monitored and critical sites based overseas blocked in many countries, including . . . China, Iran, Maldives, Myanmar [Burma], North Korea, Syria, Tunisia, Turkey, Uzbekistan, and Vietnam."<sup>62</sup> The second motivation is based on what societies have made illegal or perceive as immoral. Common examples include pornography, gambling, and criminal activities.<sup>63</sup> For example, in the U.S., the censorship of online gambling is based on morality, but protecting children's rights is an additional consideration.<sup>64</sup> The Children's Internet Protection Act requires that public libraries use internet filters as a

---

54. See *infra* Section IV.

55. See *infra* Section IV.

56. See *infra* Section V.

57. See *infra* Section VI.

58. Little & Preston, *supra* note 45, at 80.

59. Noah C.N. Hampson, *Comment, The Internet is Not a Lawless Prairie: Data Protection and Privacy in Italy*, 34 B.C. INT'L & COMP. L. REV. 477, 477 (2011).

60. General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 401 [hereinafter GATS Agreement].

61. See *id.* at 285, 286.

62. Erixon et al., *supra* note 43, at 4; see, e.g., ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 6 (Ronald Deibert et al. eds., 2008).

63. Erixon et al., *supra* note 43, at 4.

64. *Id.*



condition for receiving federal subsidies.<sup>65</sup> The Supreme Court ruled that regulation does not violate the First Amendment.<sup>66</sup>

Like the motives, the methods of censoring the internet vary. The most common technique is to block websites using software.<sup>67</sup> This can also be done by forbidding domestic Internet Service Providers (ISPs) from allowing access to any site appearing on a list of officially banned sites.<sup>68</sup> Another technique, employed in China, is to filter internet search engines.<sup>69</sup> The result is that any sites that appear on the government's black list do not appear on the results list.<sup>70</sup> A more sophisticated method is selective filtering, where only selected subpages are blocked.<sup>71</sup> Selective filtering is less restrictive than the two other methods.<sup>72</sup>

While public institutions regulate some aspects of internet activity, private institutions set standards as well. In the UK, the Internet Watch Foundation (IWF) called upon ISPs to assist in securing the internet for children through self-regulation and codes of conduct.<sup>73</sup>

In some areas of economic law, "soft regulations" can be more efficient than hard law. For many economic operators, being stigmatized by public or business opinion is more damaging than a regular public sanction. That is why nongovernmental organizations (NGOs) wield such considerable power in shaping the public sphere in civic societies. One such group, the "Save the Children Europe Group," called on the EU to coordinate work on possible internet child abuse.<sup>74</sup> This kind of initiative resulted in the Council Framework Decision on combating the sexual exploitation of children and child pornography, which was adopted in 2003.<sup>75</sup> This was later superseded by the 2011/92 Directive.<sup>76</sup>

While banning child pornography is a rather well settled principle, awareness of children's access to pornography is relatively new in terms of possible

---

65. United States v. Am. Library Ass'n, 539 U.S. 194, 201 (2003).

66. *Id.* at 214.

67. ACCESS DENIED, *supra* note 62, at 6.

68. *Id.* at 15.

69. *Id.*

70. *Id.* at 108.

71. *Id.* at 18.

72. *Id.*

73. *Id.* at 188.

74. Save the Children Europe Group, *Position Paper on Child Pornography and Internet-Related Sexual Exploitation of Children* 4–5 (2003), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj\\_9rrM28DeAhVqrIkKHbHKBZ8QFjAAegQICBAC&url=https%3A%2F%2Fec.europa.eu%2Fjustice%2Fgrants%2Fresults%2Fdaphne-toolkit%2Fen%2Ffile%2F1032%2Fdownload%3Ftoken%3DgvOsFz\\_E&usg=AOvVawluX37WytXXoFIwCTang6H1](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj_9rrM28DeAhVqrIkKHbHKBZ8QFjAAegQICBAC&url=https%3A%2F%2Fec.europa.eu%2Fjustice%2Fgrants%2Fresults%2Fdaphne-toolkit%2Fen%2Ffile%2F1032%2Fdownload%3Ftoken%3DgvOsFz_E&usg=AOvVawluX37WytXXoFIwCTang6H1).

75. *Id.*

76. See generally Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335) 1.

regulations.<sup>77</sup> Rather, it has been perceived as a moral or educational problem.<sup>78</sup> Giving minors unprecedented access to internet pornography has had noticeable negative effects on them and on society as a whole.<sup>79</sup> Despite differing moral assessments of pornography, regulating children's access to adult content has become a social necessity. The goal of regulation is therefore twofold: to regulate human behavior and to play a strong educative function so that "whistleblowers" warn about possible dangers.<sup>80</sup> It is fair to ask whether technological solutions or private standards on their own would suffice. Just as smoking bans raised awareness of tobacco's harmfulness and helped many people quit smoking, regulating access to pornography could draw attention to the possible negative effects of this phenomenon,<sup>81</sup> especially on children.<sup>82</sup> For example, the American Academy of Matrimonial Lawyers has confirmed a correlation between interest in pornographic sites and rising divorce rates in the U.S.<sup>83</sup>

The law plays a central role in shaping attitudes and formulating rules to protect children; therefore, certain legal issues, such as compliance with international or constitutional principles, have to be addressed.

To take, for example, the experience of the UK in protecting children online, the default method, namely ISP filtering, seems to be the most effective.<sup>84</sup> Apart from the issue of regulatory technique, we consider whether default adult content filtering is the most suitable method of limiting children's exposure to pornography. This mechanism allows an ISP's adult customers to opt-out of the

---

77. See generally Sonia Livingstone, *Children and Online Pornography—Does the Evidence Justify Calls for More Regulation?*, LSE BLOGS, [http://eprints.lse.ac.uk/48302/1/blogs.lse.ac.uk-Children\\_and\\_online\\_pornography\\_\\_does\\_the\\_evidence\\_justify\\_calls\\_for\\_more\\_regulation.pdf](http://eprints.lse.ac.uk/48302/1/blogs.lse.ac.uk-Children_and_online_pornography__does_the_evidence_justify_calls_for_more_regulation.pdf) (last visited Feb. 19, 2018).

78. See generally Patricia M. Greenfield, *Inadvertent Exposure to Pornography on the Internet: Implications of Peer-to-Peer File-Sharing Networks for Child Development and Families*, 25 APPLIED DEV. PSYCHOL. 741, 744 (2004).

79. *Id.* at 743–44.

80. See *What is a Law?*, JUD. LEARNING CTR., <http://judiciallearningcenter.org/law-and-the-rule-of-law/> (last visited Feb. 19, 2018).

81. See generally Simone Kühn & Jürgen Gallinat, *Brain Structure and Functional Connectivity Associated with Pornography Consumption: The Brain on Porn*, 71 JAMA PSYCHIATRY 827 (2014).

82. Ryan D. Curtis, *Panel on Porn as Health Crisis Defends Controversial Resolution*, UTAH POL. CAP. (July 28, 2016), <http://utahpoliticalcapitol.com/2016/07/28/panel-on-porn-as-health-crisis-defends-controversial-resolution/#>; see Michele L. Ybarra & Kimberly J. Mitchell, *Exposure to Internet Pornography Among Children and Adolescents: A National Survey*, 8 CYBER PSYCHOL. & BEHAV. 473, 473–74 (2005).

83. Jill C. Manning, *The Impact of Internet Pornography on Marriage and the Family: A Review of the Research*, 13 SEXUAL ADDICTION & COMPULSIVITY 131, 141 (2006).

84. See Cara McGoogan, *Porn Blocking Legislation to Cement Internet Filtering in UK Law*, TELEGRAPH (Jan. 26, 2017, 4:53 PM), <http://www.telegraph.co.uk/technology/2017/01/26/porn-blocking-legislation-cement-internet-filtering-uk-law/>.

filtering mechanism.<sup>85</sup> Children are kept safe from content inappropriate for their age, unless their parents or guardians decide otherwise. Because of its critics, such as the Open Rights Group,<sup>86</sup> this method needs to be subjected to genuine legal scrutiny, with the very first UK experience as the starting point.

#### IV. DEFINING CHALLENGES TO ADULT CONTENT REGULATIONS

Blocking prohibited images has already been tried in relation to child pornography content.<sup>87</sup> This method has been discussed within academic circles and among technology experts and has aroused controversy. The activities of the IWF and the case of Scorpions' "Virgin Killer" album cover illustrate some of the challenges involved in regulating adult content filtering.<sup>88</sup>

In December 2008, the IWF placed a Wikipedia page that showed the cover of a music album released in 1976 on its banned page list.<sup>89</sup> The cover shows a young naked girl.<sup>90</sup> The album was legal and available in music stores.<sup>91</sup> The IWF explained its decision by identifying the image as a "potentially illegal child sexual abuse image."<sup>92</sup> The decision triggered a discussion in the UK about censorship and other potential threats stemming from the existing filtering system.<sup>93</sup> After a couple of days, the IWF reversed its decision, deleted the Wikipedia address from the blocking list, and the album cover was again available online.<sup>94</sup>

This episode focused public attention on the blocking system. The first issue concerned the IWF's authority to block certain pages. This power, tantamount to censorship, is especially controversial when the blocked content is not illegal per se, as was the case with the image of the nude prepubescent girl.<sup>95</sup> The censorship allegedly went too far, threatening the fundamental freedom of expression. The second issue regarding the Wikipedia incident dealt with a remarkable lack of transparency in decision-making; the IWF did not inform Wikipedia about putting the page on the black list.<sup>96</sup>

---

85. *Id.*

86. *Id.*

87. *Wikipedia Child Image Censored*, BBC NEWS, Dec. 8, 2008, <http://news.bbc.co.uk/2/hi/uk/7770456.stm>.

88. Frank Fischer, *A Nasty Sting in the Censors' Tail*, GUARDIAN, Dec. 9, 2008, <https://www.theguardian.com/commentisfree/2008/dec/09/scorpions-virgin-killer-censorship>; see *Wikipedia Child Image Censored*, *supra* note 87.

89. *Wikipedia Child Image Censored*, *supra* note 87.

90. Bobbie Johnson, *Wikipedia Falls Foul of British Censors*, GUARDIAN, Dec. 7, 2008, <https://www.theguardian.com/technology/2008/dec/08/wikipedia-censorship>.

91. Fischer, *supra* note 88; *Wikipedia Child Image Censored*, *supra* note 87.

92. *Wikipedia Child Image Censored*, *supra* note 87.

93. Fischer, *supra* note 88; *Wikipedia Child Image Censored*, *supra* note 87.

94. Bobbie Johnson & Charles Arthur, *British Censor Reverses Wikipedia Ban*, GUARDIAN, Dec. 9, 2008, <https://www.theguardian.com/technology/2008/dec/09/wikipedia-ban-reversed>.

95. *Wikipedia Child Image Censored*, *supra* note 87.

96. *Id.*

Any filtering system can give rise to incidents of this kind and provoke further public debates and political discussions about fundamental freedoms. Some publications address the problem of freedom of speech, democracy, civil liberties, and access to information in the 21st century, when the internet serves the common and global market of ideas.<sup>97</sup> Once freedom of expression is factored into the equation, the filtering system must be subjected to strict scrutiny. Questions concerning the compatibility of limiting human rights and failing the proportionality test inevitably arise. Be that as it may, children's rights are all too often glossed over or ignored in these debates. Child protection should not only entail imposing negative duties on individuals, by limiting their behavior, but also affirmative duties on states. Therefore, a child's right to live in a safe environment should be considered when assessing adult content filtering, not just an adult's violation of the freedom of expression.

Human rights and economic freedoms sometimes clash with public morals.<sup>98</sup> We therefore test adult content filtering for compliance with the principle of proportionality, and consider the international case law on the subject. The results are then examined in a children's rights context.

#### V. BALANCING ADULT CONTENT FILTERING WITH FREEDOM OF EXPRESSION

This section analyzes the compatibility of the default filtering mechanism with the requirements of the freedom of expression. An abstract assessment of an adult content filtering system is very difficult with international or domestic legal instruments. Only a specific regulatory tool can be evaluated to permit conclusions regarding its compatibility with other standards. Nevertheless, the 2014 British filtering system<sup>99</sup> allows some general conclusions to be drawn.

First, it should be noted that the freedom of expression is protected by many constitutional systems. When looking for a common legal denominator in Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>100</sup> binding on 47 European states, may serve as the most suitable point of reference. Article 10 of the Convention provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."<sup>101</sup>

---

97. See ACCESS DENIED, *supra* note 62, at 49.

98. *Id.*; see *infra* Section A.

99. David Hirst, *Online Safety: Content Filtering by UK Internet Service Providers (ISPs)*, HOUSE OF COMMONS 1 (Nov. 21, 2014), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewjtxpOficHdAhUsq1kKHf4wCzgQFjAAegQIChAC&url=http://researchbriefings.files.parliament.uk/documents/SN07031/SN07031.pdf&usg=AOvVaw0haZ8ELYQ3nv25Ij74mEYf>.

100. Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 222.

101. *Id.* at 230.

The European Court of Human Rights has not yet been given an opportunity to express its opinion on online adult content. Nevertheless, certain cases may offer guidance in understanding the relevant limits of the freedom of speech. An illustrative example is the seizure of *The Little Red Schoolbook*, which gave rise to the *Handyside v. United Kingdom* decision.<sup>102</sup> This case is frequently cited in literature.<sup>103</sup>

In the *Handyside* case, the British authorities seized a book entitled *The Little Red Schoolbook* and prohibited its distribution.<sup>104</sup> The book was addressed to children over the age of 12 and encouraged them to question societal norms on sex, drugs, alcohol, and tobacco.<sup>105</sup> The distributor contested the prohibition before the British courts.<sup>106</sup> After losing the case, the distributor sued before the European Court of Human Rights.<sup>107</sup> The Court found that Article 10 of the ECHR had not been violated, but stated that the main objective of the judgment was to protect minors and their morals.<sup>108</sup> The limitation was therefore justified.<sup>109</sup> According to Article 10, paragraph 2 of the ECHR, the exercise of freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of health or morals.”<sup>110</sup> Therefore morals provided a justifiable ground for limiting the freedom of expression. In the context of national legal systems, the court in the *Handyside* case noted “that there was no uniform European concept of ‘morality’ and made it clear that Contracting Parties would enjoy a wide margin of appreciation in assessing whether measures were required to protect moral standards.”<sup>111</sup> A. H. Robertson similarly stated that “[t]here is more scope for the margin of appreciation . . .” in morality.<sup>112</sup> For the European Court of Human Rights, national decisions to prohibit the distribution of pornography and other indecent content are generally acceptable.<sup>113</sup> Public morals in each State-Party may vary and fall within a wide margin of appreciation. In consequence, the default adult content filtering mechanism may potentially meet the requirements of the freedom of expression under the ECHR.

---

102. App. No. 5493/72, Eur. Ct. H.R. 1, 2 (1976).

103. BERNADETTE RAINEY ET AL., EUROPEAN CONVENTION ON HUMAN RIGHTS 495 (7th ed. 2017).

104. *Handyside*, Eur. Ct. Hr. at 4–5.

105. *Id.* at 6, 12.

106. *Id.* at 13.

107. *Id.*

108. *Id.* at 12–13, 16.

109. *Id.*

110. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 100, at 230.

111. RAINEY ET AL., *supra* note 103, at 494.

112. ARTHUR H. ROBERTSON & JOHN G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 152 (3d ed. 1993).

113. *See id.* at 151–52.

The European Court, by acknowledging an important margin of appreciation, left any decisions concerning morals to domestic legislators and shifted the debate to national levels. There is no doubt in the case of pornography, and limiting access thereto, that this is at least partly predicated on public views of morality.

In multicultural and pluralistic societies, there is a certain deficiency of commonly accepted grounds for morally evaluating social relations.<sup>114</sup> Krzysztof Wojtyczek, an eminent Polish scholar and judge at the European Court of Human Rights, has enumerated two conditions that have to be met when applying the public morality exception.<sup>115</sup> First, it should reflect convictions held by the whole of society.<sup>116</sup> Second, moral principles should refer to interpersonal relations and not to the individual behavior of human beings.<sup>117</sup> According to Wojtyczek, morals refer both to public interpersonal relations and personal attitudes.<sup>118</sup> Taking this outlook into account, whether default filtering meets the requirements of these two conditions requires further analysis.

Regarding the first condition, the response depends on how the influence of pornography on childhood development is assessed. The negative social assessment relies on surveys which, in the Polish context, show exceptional unanimity. A 2013 survey revealed that 99 percent of parents believe that pornography has a potential negative influence on children.<sup>119</sup> Another unique concordance took place in the Polish Parliament in 2014 during the vote on the law amending the Penal Code.<sup>120</sup> The amendment led to the criminalization of advertising and promoting pornography among minors below the age of 15. Four hundred and thirty-three out of 447 deputies voted in favor of the amendment.<sup>121</sup> These two circumstances clearly show that children having access to pornography is viewed negatively. Wojtyczek's first condition would therefore be met in the case of default adult content filtering.

The second condition refers to interpersonal relations. Viewing pornography establishes an interpersonal relationship between the producer and consumer. When both parties to the communication process are of legal age, the Latin

---

114. *Multiculturalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY <https://plato.stanford.edu/entries/multiculturalism/> (last updated Aug. 12, 2016).

115. KRZYSZTOF WOJTYCZEK, *GRANICE INGERENCJI USTAWODAWCZEJ W SFERĘ PRAW CZŁOWIEKA W KONSTYTUCJI RP 195* (Zakamycze, Cracow (1999)).

116. *Id.*

117. *Id.*

118. *Id.* at 196.

119. *Let's Protect Children from Pornobiznesem*, TWOJA SPRAWA (Apr. 1, 2014), <http://twojasprawa.org.pl/zakonczone-akcje/4051/#.VTTCZiGvHIU>.

120. *o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, (Dz. U. 2014, poz. 538), <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU2014000538/O/D20140538.pdf> (last visited Nov. 5, 2018).

121. *Głosowanie nr 24 na 61. posiedzeniu Sejmu*, (Feb. 21, 2014), <http://www.sejm.gov.pl/sejm7.nsf/agent.xsp?symbol=glosowania&nrkadencji=7&nrglosowania=24>.

*maxim volenti non fit iniuria* (no injury is done to a willing person) applies.<sup>122</sup> They can exercise their rights in an autonomous way. But in the case of minors, this communication process is of an entirely different nature. Unlike adults, minors do not possess the ability to consciously determine their rights. They have nowhere near the same discernment. Giving parents the opportunity to limit the potentially harmful influence of pornography meets the requirements of the second condition. This argument is also partly based on the need to protect children as a vulnerable social group, which will be elaborated further. As a result, the public morality exception and the margin of appreciation under the ECHR empower national legislators to regulate adult content filtering systems on the internet.

Three other remarks should be made in the context of freedom of expression and default adult content filtering. They regard the function of freedom of expression, the legal definition of pornography, and the restrictions on freedom of expression in the name of children's rights.

First, it must be stressed that the freedom of expression is not merely a personal right, but a fundamental principle of a democratic state.<sup>123</sup> Freedom of expression is the litmus test of a civil society in that it measures that society's exercise of authority<sup>124</sup> and the proper functioning of its democratic institutions. At the same time, freedom of expression impacts human development.<sup>125</sup> Nevertheless, the claim that pornography contributes to the personal development of young people and that it should be protected for the sake of a better state of democracy or civil society is open to several objections. As the late Justice Antonin Scalia of the Supreme Court of the United States has stated, "We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment."<sup>126</sup> The First Amendment to the United States Constitution guarantees freedom of religion and freedom of expression.<sup>127</sup> Contextualized especially to children, limiting access to pornography should not be regarded as an infringement of freedoms or rights, as it is hard to argue that pornography furthers their development. In the same vein, pornography should be considered more as something that is tolerated, but beyond the scope of legal protection.

---

122. See RESTATEMENT (SECOND) OF TORTS Index V130 (AM. LAW INST. 1965); see also RESTATEMENT (SECOND) OF TORTS § 496A (AM. LAW INST. 1965).

123. Leszek Garlicki & Paweł Sarnecki, *Commentary to Art. 14 of the Polish Constitution*, in KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ. KOMENTARZ. (Leszek Garlicki ed., V 9 vol. 2007).

124. ZOFIA ZAWADZKA, WOLNOŚĆ PRASY O OCHRONA PRYWATNOŚCI OSÓB WYKONUJĄCYCH DZIAŁALNOŚĆ PUBLICZNĄ 85 (2013).

125. RAINEY ET AL., *supra* note 103, at 483; *Why is Access to Freedom of Expression Important?*, INDEX ON CENSORSHIP (March 20, 2013), <https://www.indexoncensorship.org/2013/03/why-is-access-to-freedom-of-expression-important/>.

126. *United States v. Williams*, 553 U.S. 285, 288 (2008).

127. See U.S. CONST. amend I.

Second, the legal definition of pornography is an issue that needs to be addressed in the context of default adult content filtering. This problem was raised in the United States, where the transmission of indecent material to minors had been criminalized by the Communications Decency Act (CDA) of 1996.<sup>128</sup> The CDA was ruled unconstitutional by the Supreme Court, as it established the felony of transmitting “indecent material,” which was held to be vague and imprecise.<sup>129</sup> Obviously, felonies should be precisely defined. However, the filtering mechanism does not impose penal sanctions; it is a system of cooperation with ISPs and therefore does not require a precise definition as in the case of penal law. Moreover, in that context the famous line, “I know it when I see it” comes to mind,<sup>130</sup> articulated by Justice Stewart in his concurring opinion in *Jacobellis v. Ohio*.<sup>131</sup>

Finally, the issue of justifiable limitations on freedom of expression is of great significance. According to Article 10 of the ECHR, freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the . . . rights of others.”<sup>132</sup> When deciding on adult content filtering, morals are not the only relevant consideration; the rights of others—especially children—also need to be taken into account. Those rights are not explicitly stated in the ECHR. There is, however, a separate international agreement ratified by almost every country in the world: the Convention on the Rights of the Child.<sup>133</sup> According to Article 34, “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>134</sup> This includes measures to prevent child pornography. But sexual abuse of children may also consist in showing them images which are inappropriate for their age, as this may violate their right to be brought up in a healthy humane environment. Therefore, internet filtering can be justified on the grounds of a child’s right to health, and not merely abstractly defined morals. Such conclusion is also supported by regulatory proposals in Utah.<sup>135</sup> Further, this approach to children’s rights has also been implemented in nations’ legal systems, including that of Poland.<sup>136</sup> According to Article 200, section 3 of the Criminal Code, whoever displays pornographic content or makes items of a pornographic nature available to a minor under 15 years of age, or disseminates pornographic content

---

128. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 858–61 (1997).

129. *Id.* at 867, 895–96.

130. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

131. *Id.*

132. ROBERTSON & MERRILLS, *supra* note 112, at 483.

133. *See generally* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

134. G.A. Res. 44/25, at 10, Convention on the Rights of the Child (Nov. 20, 1989).

135. S.C.R. 9, 61st Leg., Gen. Sess. (Utah 2016).

136. Emanuela Canetta et al., *EU Framework of Law for Children’s Rights*, EUR. PARLIAMENT 7, 11 (2012), [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE\\_NT\(2012\)462445\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf).



in a manner enabling such minor to become acquainted with such content, shall be liable to a penalty of deprivation of liberty for up to 3 years.<sup>137</sup> The application of penal law should only be subsidiary to technical measures and legal regulations from other legal branches, such as administrative law. Children's rights were also introduced into Article 24, paragraph 2 of the EU Charter of Fundamental Rights. That language states, "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."<sup>138</sup> Therefore private actors, as well as state organs, should consider the interests of minors when regulating their access to adult content in cyberspace.

#### A. Proportionality Test

Pursuant to Article 10 of the ECHR, freedom of expression can be limited when necessary in a democratic society.<sup>139</sup> The phrase "necessary in a democratic society" is what establishes the proportionality test.<sup>140</sup> In the EU, and under the ECHR, proportionality is understood in a formal way. The proportionality test comprises four stages: (1) there shall be a legitimate aim for the measure at hand; (2) the measure shall be adequate to achieve the aim; (3) the measure shall be necessary to achieve the aim; and (4) the measure shall aim to achieve the correct balance between restrictions and freedoms or rights.<sup>141</sup>

The first stage in the proportionality test is not contentious. Protecting children from pornography is universally deemed a legitimate aim in this formal process. The second stage establishes the criterion of adequateness, which is more problematic. For technical reasons, blocking programs has so far been anything but adequate.<sup>142</sup> It could be said that the measure is not sufficient to achieve the aim, as there are many ways of getting around the blockade. The UK system might not be perfect, but it does fulfill at least three major functions. First, it fulfills an educational function, as it informs children about the inappropriateness of pornography. Second, it limits free access to pornography. For many children, especially very young children, it is very difficult, if not impossible, to get around the blockade. The third key function of the blocking system is related to the previous one; many children do not view indecent movies or images by design, but by chance. Filtering helps avoid the accidental visiting of inappropriate pages.

---

137. Art. 200 § 3 of the Kodeks karny (Penal Code) (Dz. U. 1997 Nr 88 poz. 553), <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf>.

138. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 13.

139. RAINEY ET AL., *supra* note 103, at 483.

140. *Id.*

141. JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMACY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 193–95 (2009); Madhav Khosla, *Proportionality: An Assault on Human Rights?: A Reply*, 8 INT'L J. OF CONST. L., 299, 299 (2010).

142. Khosla, *supra* note 141, at 336–38.

It should be added that when child pornography is illegal, default filtering applies to content that does not violate law per se, but which is deemed inappropriate for children.<sup>143</sup> At the end of the day, parents can decide whether to enable or disable the filter. They can even grant their children a potential free access to pornography. The possibility of not using the system is a substantial argument in the human rights debate, especially in the assessment under the proportionality and subsidiarity tests.

The third stage of the proportionality test is deciding whether compulsion is necessary or whether the same aim can be achieved by less restrictive means. Parents can now purchase, or obtain free of charge, software that is already used in several schools and libraries. However, many parents do not do so because they lack the necessary knowledge, awareness, and/or computer skills. Free access to pornography among children is a socially incontestable fact and there is a need to limit this access. Therefore, the fourth stage, the correct balance between imposing restrictions and limiting rights, such as freedom of expression, seems to be met.

### B. Binding Law or Self-Regulation

Once it is agreed that the default adult content filtering method complies with human rights, and especially with the freedom of expression, there remains the question of regulatory technique and its incorporation into the legal system.

For many years, governments relied on the goodwill of the internet industry's self-regulatory ability.<sup>144</sup> Political pressure and civil society movements led to the establishment of self-regulatory systems with little supervision on the part of public authorities.<sup>145</sup> This prompted questions on constitutionality, especially in relation to judicial control.

For Thomas J. McIntyre, the choice between self-regulation and statutory law acts is crucial, especially from the perspective of human rights.<sup>146</sup> He invoked the U.S. context, where a voluntary blocking system can be insulated from judicial scrutiny.<sup>147</sup> But he still added that "it is probable, however, that a different result would be reached in a European context where . . . the [ECHR] . . . ha[s] horizontal effect so that [it] can be asserted against non-state actors."<sup>148</sup> In his opinion, ISPs or their institutions, could be subject to judicial control in regard to freedom of expression, at least under the ECHR.<sup>149</sup>

---

143. ACCESS DENIED, *supra* note 62, at 18.

144. See John Carr & Zoë Hilton, *Child Protection and Self-Regulation in the Internet Industry: The UK Experience*, 23 CHILD. & SOC'Y 303, 306–07 (2009).

145. *Id.*

146. See generally Thomas J. McIntyre, *Child Abuse Images and Cleanfeeds: Assessing Internet Blocking Systems*, in RESEARCH HANDBOOK ON GOVERNANCE OF THE INTERNET 277–79 (Ian Brown ed. 2013).

147. *Id.* at 298.

148. *Id.*

149. See *id.*

Many national systems face the additional hurdle of applying human rights to the horizontal relationships between ISPs and their users. These systems all face problems with implementing the freedom of expression into commercial agreements, even if, as is the case in European countries, the ECHR is applicable.<sup>150</sup> For that reason, statutory regulation would better meet the requirements of human rights protection. Filtering mechanisms would also be subject to judicial scrutiny. Having said that, a self-regulatory system of blocking is definitely more flexible and can respond more rapidly to technical progress.

The British and Polish approaches illustrate two different regulatory methods of resolving the issue. The former is based on self-regulation and governance by a private body—the IWF—which prepares the black lists of pages used by ISPs in their blocking systems.<sup>151</sup> The IWF list has a spillover effect on ISPs in many other jurisdictions where the IWF list is used in the absence of a local blocking system. The list is also deployed at home, in the workplace, and in school software.<sup>152</sup> MacIntyre claims that “the IWF list may well be the most widely used blocking list ever.”<sup>153</sup> Self-regulation has flourished internationally. It should be noted, however, that in the Digital Economy Act of 2017, the British Parliament enshrined the rights of ISPs to block pornographic content into law.<sup>154</sup> A government spokesman said, “The amendment protects the status quo around parental control features, which have been in place without legislation.”<sup>155</sup>

The second approach, based on statutory regulations, is more typical of the Continental European lawmaking tradition. It can also be more easily introduced into jurisdictions with self-regulatory experience and less-established democratic traditions. The Committee on Administration and Digitization of the Polish Parliament drafted a resolution calling on the government to draft a law on default filtering: parental control.<sup>156</sup> In its resolution, deputies asked the government to draw up an act obliging telecommunications operators to use default filtering of pornography to protect children.<sup>157</sup> This approach means that ISPs are not obliged on a self-regulatory basis, but by law. By contrast, the British system was founded on a self-regulatory model. The British system

---

150. *See id.* at 290.

151. *See id.* at 281–82.

152. *Id.* at 283.

153. *Id.*

154. Cara McGoogan, *Porn Blocking Legislation to Cement Internet Filtering in UK Law*, TELEGRAPH, Jan. 26, 2017, 4:53PM, <http://www.telegraph.co.uk/technology/2017/01/26/porn-blocking-legislation-cement-internet-filtering-uk-law/>.

155. *Id.*

156. Xawery Konarsky, *Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content*, SWISS INST. OF COMP. LAW 526 (Dec. 20, 2015), <https://rm.coe.int/168065553f>.

157. *Id.*

raises more problems with transparency and lack of judicial supervision but is less strict and more adaptable to the ever-changing digital environment.

The political decision to introduce adult content filtering into the legal system, especially through statutory regulation, still needs to be weighed against the freedom of providing services at the international and EU levels.

#### VI. BALANCING ADULT CONTENT FILTERING WITH FREEDOM OF PROVIDING SERVICES, PUBLIC MORALS, AND CHILDREN'S RIGHTS

Internet censorship may constitute a breach of the freedom of providing services under international trade law, both at the international (World Trade Organization (WTO)) and regional (European Union (EU)) levels. For this reason, different blocking methods have to be evaluated and justified on legitimate international legal grounds. They cannot serve as a model to be followed by developing countries unless they have been positively evaluated.

##### A. WTO Law

"Services are the fastest growing sector of the global economy and account for two-thirds of global output, one-third of global employment and nearly 20 percent of global trade."<sup>158</sup> Much of this growth is due to digital development and its impact on the services sector.<sup>159</sup> For example, many conventional goods, such as books and CDs, are now available online and can be downloaded across borders. This phenomenon complicates the goods/services distinction and the applicability of WTO agreements.

In WTO law, the guiding principle of free trade is reconciled and integrated with differing values through the list of exceptions provided in Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the GATS.<sup>160</sup> Both articles allow for the possibility of taking measures "necessary for the protection of human, animal or plant life or health."<sup>161</sup> As psychological research has demonstrated, exposure to internet pornography among children and adolescents is harmful.<sup>162</sup> Public health could therefore be invoked, as it is in the Utah 2016 Resolution,<sup>163</sup> as a ground for trade restrictive measures. Moreover, the WTO case law reveals possible synergies between public morality exceptions and the need to protect minors from "special health and youth protection risks."<sup>164</sup>

---

158. *TiSA Business Coalition: Introducing Team TiSA*, TEAM TiSA [http://teamtisa.org/images/Team\\_TiSA\\_Public\\_Document\\_FINAL.pdf](http://teamtisa.org/images/Team_TiSA_Public_Document_FINAL.pdf) (last visited Mar. 6, 2015).

159. *Id.*

160. GATS Agreement, *supra* note 60, at 195; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT Agreement].

161. GATS Agreement, *supra* note 60, at 195; GATT Agreement, *supra* note 160.

162. *See supra* Section I.

163. S.C.R. 9, 61st Leg., Gen. Sess. (Utah 2016).

164. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO 84 (Nov. 10, 2004), [https://www.wto.org/english/tratop\\_e/dispu\\_e/285r\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/285r_e.pdf).

GATS Article XIV(a) provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: necessary to protect public morals or to maintain public order.”<sup>165</sup> These clauses are becoming increasingly important in this day and age where the services market is expanding and more and more services can be provided online.

The conflict between free trade and public morality in the area of internet services arose in a complaint by Antigua for concerns about United States federal measures for gambling supplies from outside the United States, which came before the WTO Dispute Settlement Body.<sup>166</sup> At issue was the provision of online gambling services to U.S. consumers from Antigua and Barbuda.<sup>167</sup> The U.S. raised the issue of making online gambling available to children:

[B]ecause the Internet can be used anonymously, the danger exists that access to Internet gambling will be abused by under age gamblers. The American Psychiatric Association has similarly warned that ‘[y]oung people are at special risk for problem gambling and should be aware of the hazards of this activity, especially the danger of Internet gambling, which may pose an increased risk to high school and college-aged populations.’<sup>168</sup>

It is hard not to draw a parallel between the arguments on the negative effects and dangers associated with online gambling and the availability of adult content to minors.

The possible addiction to online gambling may represent a comparable danger to children as in the case of pornography. Also, “[r]emote gambling . . . presents special health and youth protection risks in part because it is available to anyone, anywhere—including compulsive gamblers and children—who can gamble 24 hours a day with a mere ‘click of the mouse.’ Isolation and anonymity compound the danger.”<sup>169</sup>

The Appellate Body of the WTO accepted this argument.<sup>170</sup> This judicial authority plays the greatest role in settling international economic disputes and is sometimes called “The World Trade Court.”<sup>171</sup> It found that U.S. regulations were “measures . . . necessary to protect public morals or to maintain public order” and were therefore justified.<sup>172</sup> *Per analogiam*, it could be argued that *a priori* measures intended to protect minors from inappropriate online content

---

165. *Id.* at 234.

166. *Id.* at 1, 2, 11.

167. *Id.* at 1.

168. *Id.* at 12.

169. *Id.* at 84.

170. *Id.* at 244.

171. Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court” Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. OF WORLD TRADE 605, 637 (2002).

172. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 164, at 98.

can be justified under the same exception. This determination by the Appellate Body provides an important guideline for countries seeking to regulate the online adult content available to children, including countries that have the status of “emerging and developing economies.”

## B. EU Law

The Polish approach to adult content filtering is based on proposed statutory regulations. Legislative acts seem to protect human rights better than self-regulation but, as has already been stated, they need to meet the requirements of EU electronic commerce<sup>173</sup> and regulations on child protection.<sup>174</sup>

### 1. Directive on Electronic Commerce

The Polish proposal to regulate default filtering by statute<sup>175</sup> has been the subject of intense scrutiny with regard to European law.<sup>176</sup> The Polish Sejm (Lower House of Parliament) ordered several expert opinions, at least one of which claimed that the proposed regulation did not comply with EU law, and especially not with the 2000/31 Directive on electronic commerce.<sup>177</sup> The expert opinion was based on the paradigm of freedom of expression and freedom of providing services, and seems not to have placed sufficient emphasis on children’s rights and/or European soft law on protecting children in cyberspace.<sup>178</sup>

The Directive on electronic commerce regulates certain aspects of e-services in the Internal Market.<sup>179</sup> It contains provisions on limiting the liability of ISPs and defines the concept of “mere conduit.”<sup>180</sup> This denotes the transmission of information without incurring liability for the information transmitted. EU law therefore establishes “net neutrality.”

Article 15 of the Directive on Electronic Commerce provides that member states shall not impose a general obligation on providers to monitor the information they transmit or store, or a general obligation to actively seek out

---

173. See *infra* Section VI.B.1.

174. See *infra* Section VI.B.2.

175. See *supra* Section V.B.

176. T.J. McIntyre, *Blocking Child Pornography on the Internet: European Union Developments*, 24 INT’L REV. OF L., COMPUTS. & TECH. 209, 209 (2010).

177. Agnieszka Grzelak, *Opinia prawna z dnia 9 października 2013 r. dotycząca zgodności poselskiego projektu uchwały wzywającej Ministra Administracji i Cyfryzacji do zagwarantowania rodzicom prawa do Internetu bez pornografii* (druk nr 1664) z prawem Unii Europejskiej, Biuro Analiz Sejmowych, 2.

178. *Id.*

179. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), 2000 O.J. (L 178) 1, 1.

180. *Id.* at 12–13.

facts or circumstances indicating illegal activity.<sup>181</sup> According to Article 12, member states shall ensure that the service provider is not liable for the information transmitted (“mere conduit”); ISPs shall work as a “post office,” which does not take responsibility for the letters or packages it delivers.<sup>182</sup> Under this reasoning, it should be verified whether default filtering violates the Directive.

Self-regulation does not involve public action or public authority. Economic operators autonomously bind themselves without coercion on the part of the state. Self-regulation, then, is compatible with the applicable provisions of the Directive on electronic commerce. The legislative method is more problematic, since a statute would impose a general obligation on providers to monitor the information they transmit. That filtering is assumed to violate the Directive seems to be confirmed in *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*.<sup>183</sup> The Belgian Copyright Association, SABAM, sued Scarlet Extended, an ISP, in the Belgian courts.<sup>184</sup> In 2004, SABAM became aware that internet users using Scarlet’s services were downloading works in SABAM’s catalogue via the internet without authorization and without paying royalties.<sup>185</sup> The Association therefore brought proceedings against Scarlet, claiming that Scarlet was able to prevent the copyright infringements committed by its customers.<sup>186</sup> The European Court of Justice acknowledged that:

Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart, on the other.<sup>187</sup>

The Court further referred to the Directive on electronic commerce in a very general way:

In the light of the foregoing, the answer to the questions submitted is that Directives 2000/31 . . . , read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an ISP which requires it to install the contested filtering system.<sup>188</sup>

---

181. *Id.* at 13.

182. *Id.* at 12–13.

183. Cours d’Appel [CA] [Court of Appeal] Bruxelles, 3d ch., Jan. 28, 2010, CURIA 2011, C-70/10, ¶¶ 1, 24–25 (Belg.).

184. *Id.* ¶ 18.

185. *Id.* ¶ 17.

186. *Id.* ¶ 18.

187. *Id.* ¶ 53.

188. *Id.* ¶ 54.

A similar position was taken by the European Court of Justice in *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, citing *Scarlet*.<sup>189</sup>

Although the Court of Justice rejected the idea of filtering or blocking data transmitted by the ISP, its argument was based on the need to balance the fundamental economic rights of intellectual property protection and the freedom to run a business.<sup>190</sup> However, in the case of default adult content filtering, the conflict is between the freedom of providing services and the need to protect children, guaranteed under Article 24 of the *Charter of Fundamental Rights of the European Union*.<sup>191</sup> When an economic right is inconsistent with a personal right, the latter shall be granted primacy. Even if Article 15 of the Directive on electronic commerce prohibits Member States from imposing a general obligation on ISPs to monitor the data they transmit, this Article must be read in the light of fundamental rights.<sup>192</sup> Nor should it be forgotten that internet blocking is already used for child pornography.

In conclusion, the filtering method is an acceptable measure of protecting children on the web. EU law gives priority to self-regulation, as it is more flexible and effective. At the same time, it provides enough leeway to harmonize possible statutory regulations with the Directive on Electronic Commerce and fundamental rights of children as expressed in Article 24 of the Charter. Moreover, EU law contains additional standards aimed at protecting children on the web.

## 2. Child Protection at the EU Level

The analysis of adult content filtering at the EU level should similarly be based on regulations addressed to protect children online. The Directive on combating the sexual abuse and sexual exploitation of children and child pornography is the most important European act covering these matters.<sup>193</sup> It does not cover access to pornography, but rather regulates the problem of child pornography and emphasizes prosecution and penal norms.<sup>194</sup> As for default filtering, three points should be noted from the directive. First, according to Recital 46, “Child pornography, which constitutes child sexual abuse images, is

---

189. *Rechtbanken van Eerste Aanleg* [Civ./Rb/] [Tribunal of First Instance] Brussels, 3d ch., June 28, 2010, CURIA 2012, C-360/10, ¶¶ 1, 29–34 (Belg.).

190. *Id.*

191. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 13–14.

192. Directive 2000/31/ED of the European Parliament and of the Council of 8 June 2000, 2000 O.J. (L 178) 1, 13.

193. *See generally* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335) 1 (discussing how Member States should combat the sexual abuse and sexual exploitation of children and children pornography).

194. *Id.* at 8, 10, 13.



a specific type of content which cannot be construed as the expression of an opinion.”<sup>195</sup> This echoes the observation made above in Section V that pornography is not an object of “protection” but only “tolerance” under Article 10 of the ECHR.<sup>196</sup> The second point to note is expressed in Recital 47 and Article 25(2).<sup>197</sup> According to Recital 47, mechanisms to protect children may also be put in place to block access from the Union’s territory to internet pages “identified as containing or disseminating child pornography.”<sup>198</sup> Subsequently, Article 25(2) allows for the possibility of member states taking measures to block access to web pages containing or disseminating child pornography to internet users on their territory.<sup>199</sup> Filtering is therefore a legitimate method, at least for the illegal behavior of service providers and internet users. The third point has to do with member states’ margin of appreciation. They can regulate the internet through different regulatory measures, both legislative and non-legislative.<sup>200</sup> Giving the green light to both methods requires giving an adequate level of legal certainty and predictability to users and service providers.<sup>201</sup>

The *European Strategy for a Better Internet for Children* contains this unequivocal statement: “With due respect for freedom of expression, parental controls are a complementary measure that contributes to protecting younger children from seeing inappropriate content online as they provide settings for filtering content and monitoring online activity.”<sup>202</sup> Blocking or filtering pages containing pornography is a justified method for protecting children, according to EU soft law.<sup>203</sup>

Relevant EU documents—the *European Strategy for a Better Internet for Children*, the *Report on Protecting Children in the Digital World*,<sup>204</sup> and the *EU Agenda for the Rights of the Child*<sup>205</sup>—give preference to self-regulation. In the *European Strategy for a Better Internet for Children*, this preference was

---

195. *Id.* at 6.

196. *See supra* Section V.

197. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011, *supra* note 193, at 6, 13.

198. *Id.* at 6.

199. *Id.* at 13.

200. *Id.* at 6.

201. *Id.*

202. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Strategy for a Better Internet for Children*, at 11, COM (2012) 0196 final (May 2, 2012).

203. *Id.*

204. *Id.*; *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 1, COM (2011) 556 final (Sept. 13, 2011).

205. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child*, at 1, COM (2011) 60 final (Feb. 15, 2011).

expressed as follows: “Legislation will not be discarded, but preference will be given to self-regulation, which remains the most flexible framework for achieving tangible results in this area.”<sup>206</sup> According to the *EU Agenda for the Rights of the Child*, exposure to harmful content has to be regulated through self-regulation initiatives (in conjunction with the EU Safer Internet program).<sup>207</sup> The European Commission therefore gives preference to self-regulation but does not rule out legislative tools.<sup>208</sup> Neither Directive 2011/92 nor soft law lays down any guidelines on default filtering. It may be presumed that preference is given to national regulations in line with the principle of subsidiarity.

## VII. CONCLUSION

There is a relative consensus that child pornography must be prevented. To that end, the global internet community has shown that it has the collective will and the capacity to regulate the worldwide web. Protecting children from exposure to online adult content may follow a similar but slightly different path. Private and voluntary instruments play a primary preventive role. Initiatives have been adopted by internet companies, such as Google, to provide users with a “safe search” mode. However, in many countries, private initiatives might not be adequate and civil society movements might not be sufficiently active to apply the necessary pressure on economic operators. Self-regulation of ISPs will probably not suffice and statutory laws will therefore be required. Such preventive measures should comply with and be proportional to the requirements of international law on trade and freedom of expression. Internet regulation may interfere with the provision of digital services. For this reason, it has to be justified. The rationale may stem from the exceptions provisions in the relevant agreements. These introduce the concept of public morals and public health in trade law. As the harmful impact of adult content on children’s education and development becomes more widely recognized, children’s rights, properly understood as human rights, should serve as a rationale for restricting the freedom to provide services and the right of expression if necessary. With expanding knowledge, it is highly likely that legislative models will be adapted throughout the world. Legal regulations would also allow for judicial oversight by giving the courts the power to interpret and adjudicate such legislation, as well as more public control and more transparency than soft-law instruments.

---

206. *European Strategy for a Better Internet for Children*, *supra* note 202, at 6.

207. *An EU Agenda for the Rights of the Child*, *supra* note 205, at 11.

208. *See supra* Part V, Section B.

